VITCLAY PIPES PTY. LTD.

v.

SYARIKAT VITCO (M) SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[ORIGINATING SUMMONS NO. R2-24-50-91]
25 AUGUST 1993

PRACTICE & PROCEDURE: Application to register foreign judgment - Reciprocal Enforcement of Judgments Act 1958, s. 4(1) - Application to set aside registration - Whether foreign Court had jurisdiction - Whether contract between plaintiff and defendant was made in accordance with the law of the foreign country.

The defendant applied to set aside the order of the SAR who had, on the application of the plaintiff under s. 4(1) of the Reciprocal Enforcement of Judgments Act 1958 (the Act), registered a judgment of the Supreme Court of Victoria against the defendant.

The defendant contended that they were not within the jurisdiction of the said Supreme Court and the registration should therefore be set aside under s. 5(l)(a)(ii) of the Act. Counsel for the defendant submitted that as the case did not fall within any of the situations mentioned in B. 5(2)(a)(i) to (v) of the Act, the Supreme Court did not have jurisdiction over the defendant.

Held:

[1] According to the laws of Victoria the contract between the plaintiff and the defendant was made in Victoria and was subject to the laws in that country. It was clear from 0.7.01(l)(f) and (g) of the Rules of the Supreme Court of Victoria that process can be served outside jurisdiction without any order of the Court.

[2] Since the case was one which the Court in Victoria could adjudicate and since by the Rules of Court the process could be served outside jurisdiction, the Victorian Court did have jurisdiction in the matter against the defendant.

[Defendants application dismissed with costs].

Cases referred to:

United Malayan Banking Corporation Bhd. v. Soo Lean Tool & Ors. [1984] MLJ 47 ***(foll)***

Malayan Banking Bhd. v. International Tin Council & Anor. [1989] 2 CLJ 961/[1989] 3 MLJ 286 ***(dist)***

Legislation referred to:

Reciprocal Enforcement of Judgments Act 1958, ss. 4(1), 5(lXaXii), 5(2XaXi) to (v)

Rules of the High Court 1980, O. 67 r. 9

Rules of the Supreme Court of Victoria, O. 7.01(l)(f) & (g) (Australia)

Other sources referred to:

Law of Contract in Australia (Law Book Company 1987) by Greg & Davis at pp. 74 & 75

For the plaintiff - H.Y. Chong; M/s. Azman Davidson & Co.

For the defendant - Abd. Malek B. Mohamad Nor; M/s. Malek & Devan

JUDGMENT

Wan Adnan Bin Ismail J:

By the Originating Summons dated 9 August 1991 the plaintiff had applied to the Court under s. 4(1) of the Reciprocal Enforcement of Judgments Act 1958 (the Act) to have the judgment of the Supreme Court of Victoria at Melbourne given on 5 February 1991 registered in the High Court.

The said judgment was so registered by the order of the learned Senior Assistant Registrar given on 8 January 1992.

The defendant now applies to set aside the registration of the said judgment under O. 67 r. 9 of the Rules of the High Court 1980. (Enc. (11)). The defendant also appeals against the order of the Senior Assistant Registrar. (Enc. (15)). The proper procedure is of course by making application under 0.67 r. 9 of the Rules of the High Court.

Section 5(1) of the Act provides as follows:

> 5(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment -
>
> (a) shall be set aside if the registering court is satisfied -
>
> (i) that the judgment is not a judgment to which this part applies or was registered in contravention of this Act;
>
> (ii) that the Courts of the country of the original court had no jurisdiction in the circumstances of the case;
>
> (iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may

have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;

(iv) that the judgment was obtained by fraud;

(v) that the enforcement of the judgment would be contrary to public policy in Malaysia; or

(vi) that the rights under the judgment are not vested in the person by whom the application for registration was made; and

It was the contention of the defendant that he was not within the jurisdiction of the said Supreme Court and therefore the registration should be set aside under s. 5(l)(a)(ii) referred to above. He said he did not at any time have a business address or a place ofbusiness in Victoria Australia. Neither did he ever submit to the jurisdiction of the said Supreme Court.

Section 5(2) of the Act provides as follows:

> 5(2) For the purposes of this section the courts of the country of the original court shall, subject to subsection (3) be deemed to have had jurisdiction -
>
> (a) hi the case of a judgment given in an action in personam -
>
> (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings otherwise than for the purpose of protecting, or obtaining the release of, property seized, or threatened with seizure, in the proceedings or of contesting the jurisdiction of that court;
>
> (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court;
>
> (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of the country of that court;
>
> (iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
>
> (v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;

The learned Counsel for the defendant submitted that the Supreme Court would have jurisdiction only if the case fell in any of the situations mentioned in (aXi) to (v) of s. 5(2) of the Act referred to above and not otherwise.

1 find the Counsel's interpretation of s. 5(2)(a) erroneous. What the sub-section says is that in the situations under (a)(i) to (v) the court "shall be deemed to have had jurisdiction." This does not mean that it automatically follows that the foreign Court will not have jurisdiction if the case does not fall under any of the said situations. Thus it cannot be said that if the defendant was NOT at the time when the proceedings were instituted resident in, or being a body corporate did NOT have its principal place of business in the country of the Court, that Court didNOThave jurisdiction. That Courtmay have jurisdiction by virtue of some provisions of law in existence in that country at the relevant time.

Yusof Abdul Rashid J. in *United Malay an Banking Corporation Bhd. v. Soo Lean Tooi & Ors.* [1984] MLJ 47 said:

> In my view, if the respondent was not one of those persons specified under s. 5(2Xa) of Act 99, it did not necessarily mean that the original court had no jurisdiction on the respondent. To put it differently, it was not correct to allege that unless the plaintiffs could establish that the respondent was one of those persons mentioned under s. 5(2)(a) of Act 99, the plaintiff had failed to prove that the original Court had jurisdiction over the respondent.

I agree with the learned Judge's proposition.

The relevant writ together with the statement of claim was served on the defendant in Petaling Jaya on 16 March 1990 through a firm of solicitors. According to the affidavit of service it was served "by leaving a copy of the same at their registered office at Jalan SS 21/62, Damansara Utama, 47000 Petaling Jaya, Selangor." The affidavit of Peter Robert O'Neill the Company Secretary of the plaintiff affirmed on 18

January 1991 which was used in the proceedings in Victoria states as follows:

3. The nature of the relationship between the plaintiff and the defendant during 1987 and 1988 was that the plaintiff supplied goods to the defendant in accordance with orders placed with the plaintiff by the defendant by telex or telephone. The plaintiff issued invoices to the defendant in respect of goods ordered by and supplied to the defendant, and in the absence of any arrangement to the contrary the defendant was obliged to pay plaintiff hi respect of such invoices by forwarding cheques or bank drafts to the plaintiffs premises at 41 Springfield Road, Blackburn in the State of Victoria. Under the arrangement between the plaintiff and defendant it was the defendant's responsibility to ensure that its payment reached the plaintiff in Victoria.
4. The plaintiffs claim in this action is for payment for goods provided to the defendant in accordance with orders placed pursuant to the arrangements which I have described in the previous paragraph, and invoiced to the defendant on the dates and in the sums set out in paragraph 4 of the statement of claim endorsed upon the writ herein. The particulars set out hi that paragraph are correct. The defendant was obliged to effect payment of the invoices to the plaintiff in Victoria, and no arrangement to the contrary was made.
5. The payments which are referred to in paragraph 5 of the statement of claim were made by the defendant and were received by the plaintiff hi Victoria. No other payment has been made by the defendant to the plaintiff in respect of the invoices referred to in the previous paragraph, and the defendant accordingly remains indebted to the plaintiff in the sum of $145,969.23.

Order 7.01(l)of the Rules of theSupreme Court of Victoria states as follows:

7.01(1) Originating process may be served out of Victoria without order of the Court where -
(a) ...
(b) ...
(c) ...
(d) ...
(e) ...
(f) the proceeding is one brought to enforce, rescind, dissolve, rectify, annul or otherwise affect a contract, or to recover damages or other relief in respect ofthe breach of acontract, and the contract -
(i) was made within Victoria;
(ii) was made by or through an agent carrying on business or residing within Victoria on behalf of a principal carrying on business or residing out of Victoria; or
(iii) is governed by the law of Victoria;

(g) the proceeding is brought in respect of a breach committed within Victoria of a contract wherever made, even though that breach was preceded or accompanied by a breach out of Victoria that rendered impossible the performance of that part ofthe contract which ought to have been performed within Victoria;
(h) ...

Where was the contract between the plaintiff and defendant made in accordance with the law of Victoria?

As stated above the plaintiff supplied the goods to the defendant in accordance with orders placed with the plaintiff by the defendant by telex or telephone. The plaintiff then issued invoices to the defendant in respect ofthe goods ordered and supplied to the defendant. The relevant law in existence in Victoria at the time when the proceedings were instituted is as stated in Law of Contract in Australia (Law Book Company 1987) by Greg & Davis at pp. 74 and 75. I find that the contract between the plaintiff and the defendant was made in Victoria. I also find that the contract is subject to the law of Victoria since there was no agreement to the contrary.

I was referred by the learned Counsel for the defendant to the case of *Malayan Banking Bhd. v. International Tin Council & Anor.* [1989] 3 MLJ 286 wherein the Supreme Court said "In our view, service is not solely the foundation of jurisdiction of our High Courts." This case has no application. Here we are not concerned with the jurisdiction ofthe High Courts here but with the jurisdiction ofthe Supreme Court in Victoria.

In this case, according to the laws in Victoria the contract between the plaintiff and the defendant was made in Victoria and was subject to the laws in that country. It is also clear from O. 7.01(l)(f) and (g) that process can be served

outside jurisdiction without any order of the Court. In my view since the case was one which the Court in Victoria could adjudicate and since by the Rules of Court the process could be served outside jurisdiction the Court did have jurisdiction in the matter against the defendant.

I therefore dismissed the application with costs.

WENCHES BIN B. LAJINGAH

v.

ALL PERSONS IN OCCUPATION OF THE LAND HELD UNDER NT1596 IN THE DISTRICT OF TAWAU

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[ORIGINATING SUMMONS NO. T(24) - 24 OP 1993]
9 SEPTEMBER 1993

PRACTICE & PROCEDURE; Application for vacantpossession • 0.89 r. 2 Rules of the High Court 1980 - Defendants alleging fraud and forgery - Whether therewere triable issues - Whether application should be allowed.

The plaintiff was the successful bidder for the land in question at an auction held on 22 April 1993. The plaintiff having registered himself as the owner sought to recover vacant possession of the land in question and took out an originating summons under 0. 89 r. 2 of the Rules of the High Court 1980 (RHC 1980).

The defendants who were occupiers of the said land opposed the application and claimed a right to occupy the said land as a result of permission given by the owner of the said land and stated that they had been in occupation since 1952. The question that arose was whether the defendants had raised a triable issue.

Held:

[1] The allegation in the affidavits filed on behalf of the defendants to the effect that the owner of the land had passed away in 1955 and could not have executed the charge in 1982 and that the owner of the said land could not have the identity card as stated in the charge as one of the occupiers is the bearer of the identity card bearing the number stated in the charge are triable issues.

[2] If, as contended by the occupiers, the charge was a forgery, it calls into question the validity of the ownership by the plaintiff of the said land the resolution of which would in turn decide whether the occupiers can remain on the said land.

[3] In the circumstances evidence would have to be led in Court to resolve the issues and O. 89 RHC 1980 was not the proper procedure as a writ of summons would be more appropriate.

[Plaintiffs application dismissed with costs].